No. 80-947

In the Supreme Court of the United States

OCTOBER TERM, 1980

LARRY LEON CHANEY,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the excusing of one prospective juror, who stated that she would be unable to vote for the imposition of the death penalty in any case and that the fact that the death penalty could possibly be imposed made it impossible for her to be a fair and impartial juror with regard to making a determination of guilt or innocence, violate the mandates of *Witherspoon* v. *Illinois*?

2. Does Oklahoma's death penalty statute, which allows a defendant to introduce evidence of any mitigating circumstances and under which the defendant introduced a stipulation in the second stage which evidenced a good act on his behalf at an earlier time, violate the dictates of *Lockett* v. *Ohio* because it does not provide for the conducting of a separate presentencing investigation?

3. Was the search of the petitioner's residence, which was conducted under emergency circumstances while the police were attempting to ascertain the location of the missing kidnap victims and after the petitioner had been positively connected to the ransom demands, unreasonable in light of all of the circumstances confronting the police?

4. Whether *Godfrey* v. *Georgia* is inapplicable to the present case in light of the fact that *Godfrey* turned on the failure of the Georgia Supreme Court to follow its own interpretation of Georgia law requiring a supportable finding of "torture" under the applicable aggravating circumstance before the death penalty could be imposed pursuant to that circumstance?

5. Did alleged trial errors occur during the trial regarding the trial court's instructions concerning the pre-

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The respondent State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on May 15, 1980, and to which rehearing was denied on September 12, 1980.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 612 P.2d 269 (Okl. Cr. 1980).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 15, 1980. A petition for rehearing was denied on September 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S. Supp. 1976, § 701.7 provides in part:

> "A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

* * *

Title 21 O.S. Supp. 1976, § 701.9 provides in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S. Supp. 1976, § 701.10 provides as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S. Supp. 1976, § 701.11 provides as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommenda-

tion of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S. Supp. 1976, § 701.12 provides as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S. Supp. 1976, § 701.13 provides as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

Larry Leon Chaney (hereinafter referred to as petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of 21 O.S. Supp. 1976, § 701.7A. Under this Section a person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being.

The petitioner was convicted of murdering a woman by the name of Kendal Inez Ashmore by strangulation. In the second stage the State further introduced evidence that the defendant had also strangled a young woman by the name of Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped and held for ransom with Mrs. Ashmore.

The facts that the State presented at trial revealed that on March 17, 1977, the decedent's husband, a man by the name of Phillip Ashmore, left his residence for work. Mr. Ashmore was in the construction business, and he and his wife also were engaged in the business of raising Morgan horses at their residence which was on a farm. Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck. Mr. Ashmore never saw his wife alive again.

Mr. Ashmore went to his home later that afternoon and found that neither his wife nor an employee of hers, a horse trainer by the name of Kathy Ann Brown, were there. Shortly after rounding up the horses, Mr. Ashmore received a call in which the caller stated that he had "got

your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills. . ." (Tr. 351). The caller promised to phone the next night with instructions regarding the delivery of the money. The caller also stated that if anyone heard about the call "I'll do to your wife what I did to that honky that works for you" (Tr. 351-351). Mr. Ashmore immediately called his attorney who contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to his home. At approximately 7:00 p.m. that evening, the same voice called again and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified spot by 7:30 p.m. or his wife would be killed (Tr. 363). Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds. At approximately 9:30 p.m. the same day, he received another call from the same voice which advised him that he had not left the money in the proper place, that he should go get the money, and that he would receive another call the next night. The caller stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). Mr. Ashmore never received any other call from that voice.

The call which was made at approximately 7:00 p.m. which directed Mr. Ashmore to the rodeo grounds was traced to the petitioner's telephone number. The call which was made at approximately 9:00 p.m. was traced to a

service station phone booth. The petitioner's palmprint was taken from the receiver handle on that telephone and positively identified as belonging to the petitioner, Larry Leon Chaney (P.H. Tr. 200). At the preliminary hearing, the State produced evidence showing that the officers, in addition to having the petitioner identified by the phone call being traced to his residence and his palmprint having been on the receiver of the telephone at the service station where another ransom threat was communicated from, had played the tape recording of the call from the petitioner's residence to the Ashmore residence to a police officer who knew the petitioner (P.H. Tr. 124-143). The officer told the other officers that the voice on the tape was that of the petitioner (P.H. Tr. 132).

Acting on this information, the police set up surveillance at the petitioner's home, which was within two (2) miles of the rodeo grounds where the ransom money was to be delivered, and on March 19, at 3:20 a.m., the police arrested the petitioner and searched his house looking for the victims or evidence of the victims' whereabouts. A piece of paper was removed from the trash can in petitioner's residence which had upon it the petitioner's fingerprints. The piece of paper contained the telephone number of Mr. Ashmore's residence and the number "9148," which was his street address.

Later that morning at approximately 9:00 a.m. on March 19, the pickup which Mrs. Ashmore had been driving was found in a location near south Tulsa. In the back of the pickup was found a piece of paper which the FBI identified as being part of a piece of paper, the other half of which was in Ashmore's home. The piece of paper

found in the Ashmore's home, which was in Mrs. Ashmore's handwriting, gave the location where she was to meet an individual who was to speak to her concerning horses. The note also gave the location where the pickup truck was found on the morning of March 19.

Finally on March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the petitioner's property near the city of Sallisaw, a town approximately 100 miles east of Tulsa. Her body was bound and gagged and she had been strangled with a strip of a towel.

Other evidence which the State presented placed the petitioner in the area near where Mrs. Ashmore's body was found and placed him in a motel near Sallisaw where the owners found several towels missing the day after he checked out. The towels were similar to the ones used to strangle Mrs. Ashmore. The property where Mrs. Ashmore's body was buried had been previously rented by petitioner who had been building a house at this location. A pick-ax which was found at the petitioner's residence when he was arrested was found to have soil particals on it similar to that at the location where the bodies were buried.

The jury found the petitioner guilty, and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been bound, gagged, strangled, and buried in the same grave with Mrs. Ashmore on the petitioner's property. The petitioner introduced evidence in mitigation, a stipulation concerning testimony about the petitioner's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty finding four aggravating circumstances as follows:

1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.

2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000.00 in money from the family of Kendal Inez Ashmore.

3. The murder was especially heinous, atrocious, and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.

4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge.

All four of these aggravating circumstances were specifically designated by the foreman on a form separate from the verdict form (O.R. 193).

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE EXCUSING OF ONE PROSPECTIVE JUROR WHO COULD NOT IMPOSE THE DEATH PENALTY REGARDLESS OF THE FACTS AND CIRCUMSTANCES OF THE CASE AND WHOSE FEELINGS CONCERNING THE DEATH PENALTY WERE SO STRONG THAT SHE "FEARED" THAT SHE WOULD BE INCAPABLE OF MAKING A DETERMINATION OF GUILT OR INNOCENCE IN THE FIRST STAGE OF THE PROCEEDING, DID NOT VIOLATE THE DICTATES OF *WITHERSPOON* v. *ILLINOIS*.

The petitioner contends that a violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), occurred when a prospective juror, a Ms. Feterly, was excused for cause due to her opposition to the death penalty. However, a review of the voir dire of Ms. Feterly (Tr. 95-100) reveals that this contention is meritless. The relevant parts of the questioning of Ms. Feterly reveal the following dialogues between the trial court, the defense attorney (Mr. Smallwood) and the prosecutor (Mr. Fallis):

> "THE COURT: I'll ask you the same question I asked the other jurors. In a case where the law and evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the dealth [sic] penalty?
>
> "MS. FETERLY: No, sir, I do not believe I could. (Tr. 95).
>
> * * *
>
> "THE COURT: Did you hear my question: Are your reservations about the death penalty such that regardless of the laws and facts and circumstances of the case you would not inflict the death penalty.

"MS. FETERLY: Yes, sir. I understand. I could not." (Tr. 96).

* * *

And later:

"THE COURT: . . . are you saying there is no circumstances under which you could follow that instruction whether you agree with it or not? Could you follow that instruction if the Court so instructed you? If you don't understand my question and it is too long, ask me.

"MS. FETERLY: I understand, sir. I cannot personally set judgment on any individual's life. It is just too horrible to me and I could not do it." (Tr. 97).

Further, at page 98, the following excerpt is found:

"(Mr. Smallwood) . . . Is your feeling so strong that you would be incapable of making a determination of guilt or innocence in the first proceeding?

"MS. FETERLY: I fear it would be."

Continuing on page 99, the voir dire, in pertinent part, reads:

"(Mr. Smallwood) . . . Would it be absolutely impossible for you to make a determination under any circumstances you can imagine in which you could do so, in which you could impose the death penalty?

"MS. FETERLY: Yes."

* * *

"MR. FALLIS: All right, ma'am. Do I understand you correctly that you are saying that in a case where one of the potential punishments can be death

you feel that that fact would make it impossible for you to be fair and impartial to both sides?

"MS. FETERLY: Yes, sir." (Tr. 99-100).

And, finally, the Court, at page 100, again asked:

"THE COURT: Ms. Feterly, I want to make sure I don't misunderstand what you are saying, but I think you made the statement that you could not be fair and impartial in this particular case because the death penalty could possibly be imposed. Is that correct?"

"MS. FETERLY: Yes, sir."

From this dialogue it is obvious that Ms. Feterly was properly excused for cause in accordance with the *Witherspoon* decision. As was stated in *Witherspoon:*

"The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. at 522, n. 21.

Furthermore, Ms. Feterly's answers make it clear that her "attitude toward the death penalty would prevent [her] from making an impartial decision as to [petitioner's] guilt." *Id.*, 391 U.S. at 522, n. 21. *Cf. Adams* v. *Texas*, ____ U.S. ____, 65 L.Ed.2d 581, 100 S.Ct. 2521 (1980), where the Court held that a prospective juror can constitutionally be excused for cause when it is clear that the juror's feelings about the death penalty are such that his ability to perform as a juror and follow the instructions of the court

under his oath would be "substantially impaired." The State contends that the trial court was correct in excusing Ms. Feterly due to the fact that she would be unable to "consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman,* 394 U.S. 478, 484 (1969).

Finally, it should be noted that only one other juror was removed for cause from the entire jury panel, and that was because she knew the children of one of the strangled women (Tr. 309). Therefore, the remaining panel members did not produce a "jury uncommonly willing to condemn a man to die," *Witherspoon* v. *Illinois,* 391 U.S. at 521, and was not "a tribunal organized to return a verdict of death." *Id.* at 521-522.

II. THE OKLAHOMA DEATH PENALTY STATUTE, WHICH ALLOWS A DEFENDANT TO INTRODUCE EVIDENCE OF ANY MITIGATING CIRCUMSTANCE, IS IN ACCORDANCE WITH THE DICTATES OF *LOCKETT* v. *OHIO,* AND THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO PROVIDE A SEPARATE PRESENTENCING INVESTIGATION.

The petitioner contends that Oklahoma's death statute is defective because it does not provide for the conducting of a separate presentencing investigation in addition to a separate sentencing proceeding pursuant to 21 O.S. Supp. 1976, § 701.10. Section 701.10 allows the defendant in a capital case to present evidence of "any mitigating circumstances" in the sentencing stage. *Cf. Lockett* v. *Ohio,* 438 U.S. 586 (1978), where the Court held that a defendant in a capital case must be allowed to present any relevant evi-

dence bearing on his character, prior record, or the circumstances of the offense in mitigation of punishment. In the present case the trial judge specifically instructed the jury that they were not limited as to any mitigating circumstances that they might find from the evidence (O.R. 188). The record reveals that petitioner, in the second stage, was allowed to introduce evidence that he had saved a man from a burning car on a previous occasion (Tr. 1264-1266). The State contends that petitioner's claim that he was denied the right to introduce evidence of this "act of heroism" during the second stage is flatly not true (Petition, pp. iii and 5). The trial court refused admission of this evidence only during the first stage (Tr. 959-968).

Nowhere in any of this Court's decisions is there a requirement that a presentencing investigation is required in a capital case in addition to a separate sentencing stage where the defendant is free to introduce any evidence in mitigation as to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis of a sentence of less than death." *Lockett* v. *Ohio,* 438 U.S. at 605. In Oklahoma, during the separate sentencing proceeding conducted pursuant to 21 O.S. Supp. 1976, § 701.10, a defendant is free to introduce any relevant evidence bearing on these factors. *Chaney* v. *State,* 612 P.2d 269, 279 (Okl. Cr. 1980). In the present case, the Oklahoma Court of Criminal Appeals held that the second stage must be conducted in accordance with the rules of evidence. *Id.* at 279. However, the petitioner has failed to demonstrate that in this case the rules of evidence have been applied "mechanistically to defeat the ends of justice." *Green* v. *Georgia,* 442 U.S. 95 (1979).

III. THE SEARCH OF THE PETITIONER'S RESIDENCE, WHICH WAS CONDUCTED UNDER EMERGENCY CIRCUMSTANCES WHILE THE POLICE WERE ATTEMPTING TO ASCERTAIN THE LOCATION OF THE MISSING KIDNAP VICTIMS AND AFTER THE PETITIONER HAD BEEN POSITIVELY CONNECTED TO THE RANSOM DEMANDS, WAS REASONABLE IN LIGHT OF ALL THE CIRCUMSTANCES CONFRONTING THE POLICE.

The petitioner contends that the search of his residence was illegal and unreasonable because it was conducted without a search or arrest warrant. The State would respond by first noting that traditionally emergency situations excuse the necessity of obtaining a warrant, and the facts of the present case reveal such emergency where the police had a duty and a responsibility to attempt to save the lives of the victims.

It should be remembered that in the present case the victims, two women who were eventually found strangled, had been missing from sometime during the day of March 17 until 3:00 a.m. on March 19, the date and time of petitioner's arrest. During that time Mrs. Ashmore's husband had received three phone calls threatening the life of his wife and demanding $500,000.00 in ransom.

The officers had discovered that one of the calls came from the petitioner's residence. Another call came from a telephone booth at a service station where petitioner's palmprint was lifted from the receiver and positively identified as the petitioner's prior to entry into his house (P.H. Tr. 200). The officers also had positive identification that the voice which was recorded and came from petitioner's resi-

dence to the Ashmore residence was the same as the voice making one of the ransom demands (P.H. Tr. 124-143).

The officers, armed with this information, then waited at petitioner's residence, arrested him, and searched the house looking for either the victims or evidence of their whereabouts. In a wastebasket on the floor in petitioner's kitchen, an F.B.I. agent found a note which had petitioner's fingerprints on it and upon which was written the Ashmore's telephone number and street address number "9148" (Tr. 535-540).

The Oklahoma Court of Criminal Appeals upheld the validity of the search stating that "the officers were justified in conducting a warrantless search for either the victims or evidence of their location." 612 P.2d at 277. This Court has repeatedly recognized that on occasion emergency circumstances exist that allow searches where a warrant would otherwise be required. In *Mincey* v. *Arizona*, 437 U.S. 385 (1978) while condemning a warrantless search that lasted four days, the Supreme Court reaffirmed the right of police to respond to emergency situations. The Court quoted from *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir. 1964) as follows:

> " 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " 437 U.S. at 392-393.

It should be noted that the opinion in *Wayne* v. *United States*, supra, was written by Chief Justice (then Judge) Burger and includes another quotation which is particularly relevant in the present case:

> "Police should not be required to lay seige to an apartment to await a search warrant while a life may be at stake." 318 F.2d at 214.

In *Warden* v. *Hayden*, 387 U.S. 294 (1967) the Supreme Court upheld a warrantless search of defendant's house after police arrested defendant for armed robbery within minutes after the crime. The search of the house, after defendant had been arrested on the first floor, revealed a shotgun and pistol in the flush tank of the adjoining bathroom, a jacket and trouser in a washing machine in the basement, a clip of ammunition and a cap under a mattress in defendant's bedroom, and more ammunition in a bureau drawer. The Court upheld the admission into evidence of all these items, and noting the exigency of the moment, commenting:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives *or the lives of others.*" 387 U.S. at 298-299. (Emphasis added).

This case is distinguishable from *Payton* v. *New York*, ____ U.S. ____, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) in that *Payton* involved no exigent circumstances as was the case here. Law enforcement officers, when the appropriate emergency situation arises, should have the freedom of action demonstrated here when the situation involves literally a matter of life and death. Life is replete with situations which might arise where the moment's demand requires an immediate good faith response by the police. *People* v. *Sirhan*, 7 Cal.3d 369, 497 P.2d 1121, 102 Cal.Rptr. 385 (1972), *cert. denied*, 410 U.S. 947 (1973). The police in the present

case did exactly what any civilized society would expect them to do when confronted with the barbaric acts exhibited by petitioner.

IV. *GODFREY* v. *GEORGIA* IS NOT APPLICABLE TO THE PRESENT CASE IN THAT *GODFREY* TURNED ON THE FAILURE OF THE GEORGIA SUPREME COURT TO FOLLOW ITS OWN INTERPRETATION OF GEORGIA LAW REQUIRING A SUPPORTABLE FINDING OF "TORTURE" UNDER THE APPLICABLE AGGRAVATING CIRCUMSTANCE BEFORE THE DEATH PENALTY COULD BE IMPOSED PURSUANT TO THAT CIRCUMSTANCE AND, *ALTERNATIVELY*, THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE, WHERE THE FACTS REVEAL THAT THE PETITIONER KIDNAPPED FOR RANSOM AND THEN BOUND, GAGGED, AND STRANGLED TWO WOMEN AND BURIED THEIR BODIES IN A SHALLOW GRAVE, WAS NOT VIOLATIVE OF THE DICTATES OF *GODFREY* v. *GEORGIA* IN THAT THERE IS A "PRINCIPLED WAY" TO DISTINGUISH THIS CASE FROM OTHER CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

The petitioner claims that the imposition of the death penalty in the present case violates the holding of this Court in *Godfrey* v. *Georgia*, ____ U.S. ____, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). However, the State contends that *Godfrey* was restricted to the application of a particular aggravating circumstance under Georgia law by the Georgia Supreme Court. The sole aggravating circumstance involved in *Godfrey* provided that the death penalty may be imposed in cases where the murder

> "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind,

> or aggravated battery to the victim." *Godfrey* v. *Georgia*, 64 L.E.2d at 403, *quoting* Ga. Code Ann. § 27-2534.1(b)(7).

In reviewing the *Godfrey* case, the plurality made it clear that the case turned on the Georgia Supreme Court's failure, in carrying out its statutorily imposed review of death sentences, to apply Section (b)(7) consistently and in accordance with that Court's own enunciated interpretation of Section (b)(7). The plurality, recognizing that under Georgia law the Georgia Supreme Court has a duty to review death sentences and determine whether the evidence supported the sentencer's findings as to aggravating circumstances, stated:

> "In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep § (b)(7) within constitutional bounds. Recognizing that 'there is a possibility of abuse of [the § (b)(7)] statutory aggravating circumstance,' the court has emphasized that it will not permit the language of that subsection simply to become a 'catch all' for cases which do not fit within any other statutory aggravating circumstance. Harris v State, 237 Ga 718, 732, 230 SE2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its 'approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core.' Id., 237 Ga, at 733, 230 SE2d, at 11." *Godfrey* v. *Georgia*, 46 L.Ed.2d at 407.

The plurality in *Godfrey* then pointed out that in *Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976) and *Blake* v. *State*, 239 Ga. 292, 236 S.E.2d 637 (1977), the Georgia Supreme Court had interpreted Section (b)(7) to require that

the murder be "torturous" in nature before Section (b) (7) could be applied. The plurality then noted that in *Godfrey*, the Georgia Supreme Court had failed to limit the application of Section (b) (7) as it previously said it would. The plurality stated:

> "The Harris and Blake opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b) (7) aggravating circumstance. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate '*torture*, depravity of mind, or an aggravated battery to the victim.' The second was that the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murder to *torture* or to commit an aggravated battery before killing his victim. The third, derived from Blake alone, was that the word, '*torture*,' must be construed in pari materia with 'aggravated battery' so as to require evidence of *serious physical abuse of the victim before death*. Indeed, the circumstances proved in a number of the § (b) (7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria.
>
> *"The Georgia courts did not, however, so limit § (b)(7) in the present case."* (Emphasis added). *Godfrey* v. *Georgia*, 64 L.Ed.2d at 408.

After discussing the specific facts of the case, and emphasizing that both the prosecutor and trial judge affirmatively stated that there was no element of torture involved, the plurality stated:

> "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases." *Godfrey* v. *Georgia*, 64 L.Ed.2d at 609.

That *Godfrey* turned on a failure of the Georgia Supreme Court to follow its own law is further emphasized in the concurring and dissenting opinions. In his concurring opinion, Mr. Justice Marshall referred to "the plurality's characterization of the decision below as an aberrational lapse on the part of the Georgia Supreme Court from an ordinarily narrow construction of § (b) (7)." 64 L.Ed.2d at 411. Mr. Justice White, in his dissenting opinion, stated the issue of the case was "whether in affirming petitioner's death sentence, the Georgia Supreme Court adopted such a broad construction of Ga Code Ann § 26-2534.1 (b) (7) as to violate the Eighth and Fourteenth Amendments to the United States Constitution." 64 L.Ed2d at 415.

A further indication that *Godfrey* deals only with Georgia's application of its own law is found in the fact that eight days following the *Godfrey* decision, this Court vacated death sentences in six other Georgia cases and remanded them to the Georgia Supreme Court "for further consideration in light of *Godfrey* v. *Georgia* (citation omitted)." *See Davis* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 819 (1980); *Spraggins* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Collins* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Baker* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Hamilton* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); and *Brooks* v. *Geeorgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 821 (1980).

The State submits that *Godfrey* dealt solely with the Georgia Supreme Court's failure to follow and apply its own law as it said it would. Petitioner's attempt to equate the language of *Godfrey* to the present case is without

foundation. He would have this Court make a comparison of the facts in the present case to those of *Godfrey*. Yet, his argument must fail. The aggravating circumstance involved in *Godfrey* was that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7). The aggravating circumstance at issue here, although not the only one relied upon, is whether the murder was "especially heinous, atrocious, or cruel." The Oklahoma Court of Criminal Appeals has defined that phrase for application in Oklahoma in a manner very similar to the definition employed by the Florida Supreme Court. *See Eddings* v. *State*, 616 P.2d 1159, 1167 (Okl. Cr. 1980); *Chaney* v. *State*, 612 P.2d 269, 280 (Okl. Cr. 1980). Yet the Oklahoma Court has affirmatively rejected the notion that "especially heinous, atrocious, or cruel" means torturous. *See Irvin* v. *State*, 617 P.2d 588, 598-599 (Okl. Cr. 1980). The Oklahoma Court of Criminal Appeals has applied this phrase, in large part to the defendant's state of mind and to the specific facts of the murder, not simply to the physical pain endured by the victim.

Moreover, petitioner would have this Court base its decision solely on a comparison of the single aggravating circumstance employed in *Godfrey* with the four aggravating circumstances found to exist in the present case. The State submits that *Godfrey* must be restricted to the application of Georgia law and should not be the basis of a nationwide factual comparison of death penalty cases. The State submits that the crucial element for review is the consistency of the application of the death penalty within

any given state. The State submits that the Oklahoma Court of Criminal Appeals has applied Oklahoma law with consistency.

Alternatively, should this Court wish to make a factual comparison of *Godfrey* with the present case, the State submits that the present case far surpasses *Godfrey.* The State contends that the facts of the case reveal one of the more hideous crimes imaginable. The Oklahoma Court of Criminal Appeals stated:

> ". . . this case is one of the most heinous and cruel cases considered by this Court. The manner in which the women were killed, coupled with the demand for ransom and the manner in which the bodies were disposed of, justified the imposition of the death penalty." 612 P.2d at 283.

The facts of the present case are immediately distinguishable from those in *Godfrey.* There the defendant, after a "heated" argument with family members who were causing him extreme emotional trauma, killed "instantaneously." In the present case, the petitioner calculatedly murdered two women who were strangers to him and whom he had kidnapped. The victims were strangled by strips of towels after having been bound and gagged.

Furthermore, in the present case the jury was instructed regarding the words "especially heinous, atrocious or cruel" in accordance with the construction of the identical Florida aggravating circumstance in *State* v. *Dixon,* 283 So.2d 1, 9 (Fla. 1973). *See Proffitt* v. *Florida,* 428 U.S. 242, 255-256 (1976); (O.R. 191). As discussed previously, this definition has been adopted by the Oklahoma Court of Criminal Appeals as well. *Irvin* v. *State,* supra at 598-599.

The State submits that the facts of this case fall directly in the categories of murder which Justice Stewart noted "where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, 428 U.S. 153, 186 (1976). Justice Stewart enumerated certain types of murders which he was referring to as follows:

> "Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, *the extortion murder of hostages or kidnap victims*, and the execution-style killing of witnesses to a crime." 428 U.S. at 186, n. 33. (Emphasis added).

Obviously, the present case falls within the category of "extortion murder of hostages or kidnap victims."

V. THERE WERE NO TRIAL ERRORS WHICH OCCURRED WHICH AFFECTED THE PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

The petitioner claims that a number of other errors occurred at trial which violated his constitutional rights. The State will respond to those claims in one proposition.

The petitioner claims, on page 19 of his Petition, that the decision "probably conflicts" with *Taylor* v. *Kentucky*, 437 U.S. 478 (1978) "because the trial judge in the instant case failed to instruct the jury specifically that it was to presume the petitioner innocent of the second murder charge at all times throughout both stages." The State flatly states that this assertion is untrue. The record reveals that the court instructed the jury as follows in the second stage:

> "The defendant is presumed to be innocent of the charge made against him in said bill of particulars, and innocent of each and every material element of said charge, and this presumption of innocence continues until such time as his guilt thereof is shown to your satisfaction beyond a reasonable doubt, and if, upon a consideration of all the evidence, facts and circumstances in the case you entertain a reasonable doubt of the guilt of the defendant of the charge made against him in said bill of particulars you must give him the benefit of that doubt." (O.R. 183).

The instructions also covered the presumption of innocence at the first stage as well (O.R. 154). Therefore, this contention is totally without merit.

The petitioner claims that this Court's ruling in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), was not followed when the trial court refused to allow him to cross-examine his own witness concerning a previous conversation the petitioner's attorney and he had previously had, and also refused to allow another witness to testify as to the substance of that conversation. The State assumes petitioner is referring to the testimony of Frank Cooper (Tr. 907-915), and Gary Jones (Tr. 916-929), which was discussed by the Oklahoma Court of Criminal Appeals in its opinion, 612 P.2d at 280-281. The record of this testimony reveals that the defense attorney was not surprised by the witnesses' testimony. The Oklahoma Court of Criminal Appeals noted that the petitioner's attorney, in his opening statement, related what he thought the witness would testify to and then stated "and if Mr. Cooper testifies to that, fine." 612 P.2d at 281. Additionally, the Oklahoma Court of Criminal Appeals noted that it is the rule in Oklahoma

that before a witness can be impeached, the testimony must be injurious to the defendant and found that Mr. Cooper's testimony did not qualify in that regard. *Chambers* v. *Mississippi* is, therefore, clearly distinguishable. In that case the witness surprised the defense attorney by repudiating a previously sworn statement in which he admitted killing the victim himself. The purported testimony in the present case does not approach that in *Chambers,* and the Oklahoma hearsay rule did not work to frustrate justice as it did in *Chambers.*

The petitioner also objects to a part of the prosecutor's closing argument in which the prosecutor made a reference to when St. Patrick drove a serpent out of Ireland (Tr. 1184). The Oklahoma Court of Criminal Appeals found that the remarks were not so grossly improper as to affect the jury's verdict. 612 P.2d at 275. The State contends that in view of the overwhelming nature of the evidence and the fact that the petitioner did not challenge the sufficiency of such on appeal, that the remarks, in the context of the entire record, were not "so fundamentally unfair as to deny him due process." *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974).

CONCLUSION

For these reasons, the State of Oklahoma respectfully requests that this petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this _____ day of February, 1981, three (3) true and correct copies of the foregoing Brief in Opposition were served as prescribed by the Rules of this Court, by placing same in the U. S. Mail, postage fully prepaid, to:

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